UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

United States of America,

Plaintiff,

vs.

Alexander "Alex" White Plume, Percy White Plume, their agents, servants, assigns, attorneys, and all others acting in concert with the named Defendants,

Defendants.

Case No.: 02-cv-5071

Reply Memorandum in Support of Motion for Rule 60(b) Relief

Introduction

The Government spends the overwhelming majority of its Opposition briefing arguing that, despite the 2014 Farm Bill, industrial hemp cultivation is not legal on the Pine Ridge Indian Reservation. Respectfully, the Government misses the point. Mr. White Plume's Rule 60 motion does not require the court to even address that issue. Regardless of whether the Controlled Substances Act ("CSA"), the Agricultural Act of 2014 (the "Farm Bill"), and the Cole and Wilkinson Memoranda allow anyone to cultivate industrial hemp on the Pine Ridge Indian Reservation, the injunction against Mr. White Plume is inequitable given the changes to the legal landscape surrounding marijuana and hemp. This injunction prohibits Alex White Plume from engaging in a legal activity, regardless of whether he is currently living on the Pine Ridge Indian

Reservation, moves to Kentucky,[1] or wishes to explore opportunities assisting licensed Colorado[2] hemp growers. Similarly, while the Government's position on the distinction between states and Indian tribes and the rights of Tribes to self-governance represents a worrisome regression in its approach to tribal sovereignty, the Court need not reach that issue either. The only question properly before the Court is whether a decade-old injunction targeting Mr. White Plume—the only one of its kind in history—can properly stand given the recent legislative and executive action that have altered the conditions under which the injunction was issued.

I. Mr. White Plume's ability to legally cultivate industrial hemp on the Pine Ridge Indian Reservation is not at issue in this Motion.

In opposing Mr. White Plume's motion for Rule 60(b) relief, the Government argues that Mr. White Plume is not legally permitted to cultivate industrial hemp and that Mr. White Plume "essentially seeks license, through this motion, to violate the CSA." (U.S.A.'s Response to Motion for Rule 60(b) Relief ("U.S.A. Resp.") at 3.) It further asserts that "the legal conclusion that the CSA prohibits the cultivation of hemp or industrial hemp on the Pine Ridge Indian Reservation is not properly challenged under Rule 60(b)(5)." (*Id.* at 5.) While conflating the limited, personal relief Mr. White Plume seeks with the larger issue of legalizing industrial hemp growth on Pine Ridge may serve the Government's desire to defeat the motion (and unnecessarily raise the

[1] Kentucky Dep't of Agric., *Industrial Hemp Program*, http://www.kyagr.com/marketing/hemp-pilot.html (last visited Oct. 7, 2015).
[2] Colorado Dep't of Agric., *Industrial Hemp*, https://www.colorado.gov/pacific/agplants/industrial-hemp (last visited Oct. 7, 2015).

specter of running afoul of Federal drug laws), it has no place in this matter.

Under the current Court order, Mr. White Plume is "permanently enjoined from cultivating Cannabis sativa L., otherwise known as marijuana or hemp, without a valid Drug Enforcement Administration registration."(ECF No. 101.) This indefinite injunction bars Mr. White Plume from growing industrial hemp anywhere in the United States under any circumstances—even where doing so without a Drug Enforcement Agency ("DEA") permit (for instance, as part of a research program under the Farm Bill) is now undeniably legal.

Whether and where Mr. White Plume can legally cultivate industrial hemp if the injunction is lifted is not currently a question before this Court. And to be clear, Mr. White Plume's request for Rule 60(b) relief does not ask this Court for a declaratory judgment that Mr. White Plume is permitted to grow industrial hemp on the Pine Ridge Indian Reservation. Nor does the Court need to reach the broader issue of whether cultivation of industrial hemp on the Pine Ridge Indian Reservation is legal as a general matter. Instead, the present motion asks merely that the Court lift the injunction against Mr. White Plume so that he may explore the same potential economic and research opportunities currently available to industrial hemp producers across the country.[3]

[3] In the alternative, this Court has the authority to modify the existing injunction to permit Mr. White Plume to enjoy the same rights as all other Americans under the Farm Bill; namely, to consult and participate in industrial hemp cultivation to the extent permitted by the Farm Bill. The recent change in the treatment of industrial hemp by the legislative and executive branches of government require that Mr. White Plume be allowed to cultivate industrial hemp to the same extent (no more, no less) as members of the general public, in places like Colorado, Kentucky, and Oregon, which have established hemp research programs under the Farm Bill.

II. A changed legal landscape regarding Cannabis makes the injunction against Mr. White Plume "no longer equitable."

The Government boldly asserts that "there has been no change in the 'legal landscape' . . . relevant to White Plume." (U.S.A. Resp. at 6.) Put plainly, the Government is wrong. The legal landscape regarding industrial hemp, medical marijuana, and recreational marijuana has indeed changed significantly since this injunction was issued against Mr. White Plume a decade ago, and these changes affect Mr. White Plume.

A. The Farm Bill

The Government asserts that the Farm Bill's "narrow exception" to general prohibitions on hemp cultivation does not represent a change relevant to Mr. White Plume. (U.S.A. Resp. at 6–7.) Specifically, the Government argues that the Farm Bill only allows institutions of higher education or state departments of agriculture to cultivate industrial hemp. (*Id.*) Because Mr. White Plume himself is not a university or agriculture department, the Government argues, he is not permitted to cultivate industrial hemp under this provision. (*Id.*)

In practice, however, the law has not been interpreted as narrowly for other industrial hemp producers as the Government now advocates it be applied to Mr. White Plume. In Kentucky, individual farmers have applied to and participated in the Department of Agriculture's pilot programs. Application to the program is available and open to *everyone* and does not require that applicants be institutions of higher

learning or affiliated with such an institution.[4] In fact, the only people Kentucky has currently deemed ineligible to apply to its industrial hemp farming pilot program are "person[s] with a felony drug conviction within 10 years of submitting an application."[5]

This is not just a matter of an open application process, either. The actual Kentucky industrial hemp program participants have included individual farmers. Of the 121 participants selected for the program in 2015, only seven were state universities; the others were growers and processors.[6] It is therefore not merely speculative to suggest that Mr. White Plume could have the opportunity to participate in a program like Kentucky's or serve as a consultant for program participants absent the injunction against him, because individual farmers in Kentucky are already doing so. Mr. White Plume should have the same opportunity to participate in such a program as individual farmers living in Kentucky, Colorado, or Oregon. The permanent injunction against Mr. White Plume improperly denies him that opportunity.

---

[4] KENTUCKY DEP'T OF AGRIC., *Industrial Hemp Program Application*, http://www.kyagr.com/marketing/documents/ HEMP_Application.pdf (last visited Oct. 7, 2015).

[5] Press Release, Kentucky Dep't. of Agric., State Ag Department is Taking Applications for 2015 Industrial Hemp Pilot Projects (Dec. 1, 2014) *available at* http://www.kyagr.com/kentucky-agnews/press-releases/state-ag-department-is-taking-applications-for-2015-industrial-hemp-pilot-projects.html.

[6] Janet Patton, *Hemp Industry is Growing in Kentucky, Attracting Processors, Investment*, LEXINGTON HERALD-LEADER (May 5, 2015), http://www.kentucky.com/2015/05/05/3836959/hemp-growing-in-kentucky-attracting.html; *see also* Press Release, Kentucky Dep't of Agric., Comer, Growers, Industry Leaders Announce Array of Hemp Projects and Business Initiatives (May 5, 2015) *available at* http://www.kyagr.com/Kentucky-AGNEWS/press-releases/Comer-growers-industry-leaders-announce-array-of-hemp-projects-business-initiatives.html.

B. The Cole Memorandum

The Government also argues that the Cole Memorandum does not make marijuana legal under the CSA (U.S.A. Resp. at 13). Though true, this position discounts the Cole Memorandum's dramatic and tangible impact on marijuana enforcement. Indeed, the Government's realigned enforcement priorities demonstrate real change in the legal landscape surrounding Cannabis, as perhaps best exemplified by the booming Cannabis industry in Colorado.

Despite strong sales of marijuana in Colorado since 2014, the DEA has not engage in the blanket enforcement of federal drug laws by shuttering large numbers of dispensaries for federal drug-related crimes in that state.[7] The recreational and medical marijuana market in Colorado—a $700 million dollar industry in 2014 that's projected to top $1 billion by 2016[8]—is thriving and a testament to the effect of the policy shift.

The changes regarding marijuana and industrial hemp brought about by the Cole Memorandum and the Farm Bill have undeniably changed the Cannabis-related legal landscape. Such changes have made applying the injunction "no longer

---

[7] *See* Christopher Ingraham, *Colorado Marijuana Revenues Hit a New High*, WASH. POST (Oct. 14, 2014), http://www.washingtonpost.com/news/wonkblog/wp/2014/10/14/Colorado-marijuana-revenues-hit-a-new-high/; Eric Gorski, John Ingold, & Kieran Nicholson, *DEA Raids Four Denver Marijuana Sites Related to VIP Cannabis*, DENVER POST (May 1, 2014, 1:26 a.m.), http://www.denverpost.com/news/ci_25666066/dea-raids-vip-cannabis-cuts-open-safes (highlighting that even though federal agents raided approximately a dozen medical marijuana businesses in Colorado, the indictment related to money laundering and "no charges directly related to drug crimes").

[8] *See* Christopher Ingram, "Colorado's legal weed market: $700 million in sales last year, $1 billion by 2016," Wonkblog, WASHINGTON POST (Feb. 12, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/02/12/colorados-legal-weed-market-700-million-in-sales-last-year-1-billion-by-2016/.

equitable,"[9] and the Court should remedy this inequity by freeing Mr. White Plume from the order.

III. The Farm Bill applies to Tribal law as equally as State law, but the issue is not determinative for purposes of this Motion.

The Government argues that tribal law should not be respected as equal to State law for the purposes of industrial hemp cultivation under the Farm Bill. Mr. White Plume disagrees with this position, though his requested relief does not require the Court to address this issue either. The government's position, however, is incomplete, given the full text of the Farm Bill.

While the Farm Bill's industrial hemp farming provision—enacted into law as 7 U.S.C. § 5940 – Legitimacy of industrial hemp research—does not define "State," the full text of the legislation in which it was included does. Section 1111 of the Farm Bill (on Commodity Policy) defines "State" as "(A) a State; (B) the District of Columbia; (C) the Commonwealth of Puerto Rico; and (D) any other territory or possession of the United States." 7 U.S.C. § 9011 (20) (2015). The Farm Bill reinforces this definition by defining "United States" to include "any other territory or possession of the United States." 7 U.S.C. § 9051 (11).

Many courts have held that when the term "State" is defined to include any territory or possession of the United States, tribal land is included. *See In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989) (finding that the Cherokee tribe is a state for purposes of the

[9] Federal Rule of Civil Procedure 60(b)(5).

Parental Kidnapping Prevention Act); *Whitsett v. Forehand*, 79 N.C. 230, 232 (N.C. 1878) (defining territory to include the Cherokee Nation); *Martinez v. Superior Court*, 731 P.2d 1244, 1247 (Ariz. Ct. App. 1987) (holding that "Indian reservations are territories or possessions of the United States as used in the Uniform Child Custody Jurisdiction Act"); *but see Baker v. John*, 982 P.2d 738, 762 (Alaska 1999); *In re Sengstock*, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991).

Statutes defining "State" to include a "territory or possession," then, have been applied equally to States and to Indian Country. Because the Farm Bill defines State to include any territory or possession of the United States and because courts have interpreted this language to include Tribal land, the Government incorrectly asserts that the Farm Bill's industrial hemp provision does not envision the applicability of or respect for Tribal laws.

The Government's advocacy for disparate treatment of Tribes and States under the Farm Bill is also surprising, based on public positions staked out by representatives of the Department of Justice. On August 13, 2015, the Acting United States Attorney informed the Rosebud Sioux Tribal Counsel that "tribes are going to be treated the same as the State of Colorado when it comes to marijuana. If Rosebud wants to get into the business of growing and selling marijuana, it would be treated the same as the State of

Colorado."[10] Surely, this interpretation was not limited to just one Tribe within South Dakota.

Conclusion

Mr. White Plume's Rule 60 motion seeks very specific and narrow relief: overturning—or, in the alternative, modifying—the permanent injunction against him that recent legislative and executive action has rendered inequitable. The motion does not ask this Court to declare industrial hemp growth on Pine Ridge legal or to allow Mr. White Plume to violate the Controlled Substances Act, and the Court need not concern itself with these matters. Rather, the motion simply seeks to return Mr. White Plume to an equal footing with all other Americans, and he respectfully requests that the Court grant such relief at this time. Finally, as requested in his opening brief, Mr. White Plume requests oral argument on this motion pursuant to Local Rule 7.1(C).

Dated: October 21, 2015

/s/ Ronald A. Parsons Jr.

Ronald A. Parsons Jr.
Delia Druley
Johnson, Janklow, Abdallah, Bollweg & Parsons, LLP
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
T: 605-610-2188
F: 605-338-4162
ron@janklowabdallah.com
delia@janklowabdallah.com

Timothy Q. Purdon (*pro hac vice*)
Michael D. Reif (*pro hac vice*)
Robins Kaplan LLP
2800 LaSalle Plaza

[10] Video: Regular Tribal Council Meeting (8-13-15) (*available at* https://www.youtube.com/watch?v=bIScTaigcxw&noredirect=1) (discussion of Cannabis in Indian Country begins at 1:56).

800 LaSalle Avenue
Minneapolis, MN 55402
T: (612) 349-8500
F: (612) 339-4181
tpurdon@robinskaplan.com
mreif@robinskaplan.com

Counsel for Defendant Alexander White Plume